No. 02-626

Supreme Court, U.S.
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In The

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF

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TABLE OF AUTHORITIES

Page

CASES:

AT&T Corp. v. *Iowa Util. Bd.*, 525 U.S. 366 (1999) 10

Borden Ranch Partnership v. *U.S. Army Corps of Engineers*, 537 U.S. 99 (2002)..... 5

Catskill Mountains Chapter of Trout Unlimited, Inc. v. *City of New York*, 273 F.3d 481 (2d Cir. 2001)..... 9

Catskill Mountains Chapter of Trout Unlimited, Inc. v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003) 2, 4

Dubois v. *U. S. Dept. of Ag.*, 102 F.3d 1273 (1st Cir. 1996).....2, 3, 4

Fishermen v. *Closter Farms*, 300 F.3d 1294 (11th Cir. 2002).....7, 8

Minnesota Ctr. for Envir. Advocacy v. *Minn. Pollution Ctl. Agency*, 660 N.W.2d 427 (Minn. App. Ct. 2003)..... 9

National Wildlife Federation v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) 2, 3, 4

National Wildlife Federation v. *Gorsuch*, Admin., U.S. Environmental Protection Agency, 693 F.2d 156 (D.C. Cir. 1982).....2, 3, 4

Northern Plains Resource Council v. *Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003)..... 5

TABLE OF AUTHORITIES – Continued

Page

Solid Waste Agency of Northern Cook County v. *U.S. Army Corps of Engineers, et al.*, 531 U.S. 159 (2001) 5

United States v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501 (11th Cir. 1985) 4

STATUTES AND REGULATIONS:

33 U.S.C. §1251(b)&(g) 2

33 U.S.C. §1341(f)(2)(F) 1

40 C.F.R. §122.47 9

Section 62-620.705, Fla. Admin. Code 9

Section 62-621.100, Fla. Admin. Code 9

OTHER AUTHORITIES:

General Permit Program Guidance, EPA Office of Water 4 (1988) 9

U.S. EPA's NPES Permit Writers Manual <http://www.epa.gov/npdes/pubs/owm0243.pdf> 8

This supplemental brief responds to the Brief for the United States as Amicus Curiae, which effectively underscores the need for this Court to grant certiorari.

The United States concedes that the Eleventh Circuit's ruling is "incorrect" (US Br. 13); that this Court will ultimately have to review the rule adopted by the court of appeals (US Br. 15 n.5); and that ensuring water quality in the Everglades is of paramount national importance. US Br. 1-7. It also acknowledges the agencies have exercised intensive oversight of the S-9 facility for 30 years, throughout which they have consistently addressed Everglades' water quality through system-wide planning and state permitting, *not* the NPDES program. *Ibid.*

At the same time, the United States stands silent on several matters raised in the Petition. It makes no mention of the second question presented, which asks why deference was not given to the agencies' longstanding and consistent practice of regulating S-9 under state, not NPDES permits. It does not challenge the agencies' interpretation, documented in FDEP's opinion letter (Pet. App. 43-48), that NPDES extends only to point sources from which pollutants originate, the core issue invoked by the Petition. It does not so much as mention the fifteen amici, joined in five briefs, and numerous letters from organizations and governmental representatives across the country (App., *infra.*, 1a-17a), which all attest to the critical national importance of the issues presented and to considerable concern with extending NPDES to traditional state and local water management.

In fact, the government largely avoids the key issues raised by the petition and amicus briefs:

1. Whether NPDES was ever intended by Congress to regulate state water control structures that add nothing to the waters (Pet. 20-21; Reply Br. 7-10);
2. Why the S-9 is not governed under §304(f)(2)(F) of the CWA, 33 U.S.C. §1314(f)(2)(F), providing for water pollution caused by levees, canals and flow diversion facilities to be addressed as non-point source under state, not NPDES guidelines (Pet. 6-7; Reply Br. 9-10);

3. Why a state's non-NPDES programs are not the preferable mechanism for regulating local water use decisions (Pet. 21-24; Reply Br. 9-10); and
4. Whether the imposition of NPDES in this case violates the careful balance struck in the CWA between federal and state rights and responsibilities. Pet. 5; 33 U.S.C. §1251(b) & (g).

The court of appeals below answered each of these questions differently than the courts of appeals in *Gorsuch* and *Consumers Power*, creating a square conflict ripe for this Court's resolution. Contrary to the government, we demonstrate below, these fundamental conflicts are legal, not factually dependent upon whether the waters involved have or ever had any hydrologic relationship to each other.

The United States seeks to discourage the Court's review with three misinformed arguments. First, the government mischaracterizes the court of appeals' error as "factual," by claiming any conflict in the case law can tidily be reconciled simply by considering the hydrologic relationships between transferred and receiving waters. Second, the government contends, without mentioning the amici and other national supporters (App., *infra.*, 1a-17a), that this case lacks nationwide import. Third, the government presents the startling, and incorrect, assumption that the "burden" of allowing the erroneous ruling to stand will be "modest." On these grounds the United States concludes that the proper scope of the CWA should be determined through fact-intensive inquiries and further litigation rather than with guidance from this Court as to the meaning of the statute. Each of these arguments is seriously misleading and should not discourage the Court from granting review.

1. According to the Solicitor General, the Eleventh Circuit's ruling turned on a factual inquiry into whether the S-9 point source and its accompanying levees and canals divide "two separate bodies of water" or a single water body. Furthermore, the government asserts the cases that we contend are in conflict – *Catskill*, *Gorsuch*, *Dubois*, *Consumers Power*, and the decision below – can all be

reconciled by reference to how each court answered this factual question. The government's argument ignores that the relevant facts in this case were *agreed*, not contested. It ignores that the Eleventh Circuit's "but for" test in no way turns on whether waters are unitary or separate. It ignores that the courts of appeals cases are deeply divided over whether the factual question identified by the government is of any legal relevance. It ignores that, in *Dubois*, the First Circuit specifically *rejected* the government's purported distinction. And it ignores that *Gorsuch* and *Consumers Powers* were *explicitly* decided on the basis that water was being transferred from one water body to another, yet no NPDES permit was required. In short, the government's "distinction" is no distinction at all, but merely confirms the rampant confusion as to the scope of the CWA's NPDES requirement.

To begin with, the Eleventh Circuit resolved no factual dispute as to the unitary nature of the waters in question or otherwise. The relevant facts are clear, were undisputed by the parties, and were acknowledged by both courts below. The parties *agreed* that the waters pumped by S-9 were "historically *** both part of the Everglades," so that "historically *** water flowed across both areas," and that the canal, levees, and pump station built by the Corps disrupted that flow and divided the C-11 basin from populated western Broward County. US Br. 6, 12; C.A. R. Vol. 2, Doc. 65 at 3-4. Water control projects invariably result in such changes and divisions, wherever in the country they are located, and whether designed for flood control, irrigation, drinking water supply, or otherwise. Changing the natural distribution of water is the very purpose of such projects, and in most such cases unitary water bodies are interrupted.

Moreover, the court of appeals did not deem the fact question relied on by the government to be legally relevant. The Eleventh Circuit's broad "but for" test for whether an "addition" of pollutants occurs "from" a point source depends not at all on the historic or natural relationship of the waters involved. In fact, the court expressly relied upon a prior decision requiring a permit to move pollutants within what was indisputably a *single* water body. See Pet.

App. 7a, citing *United States* v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985). Thus, no "factually intensive inquiry" into the unitary or separate nature of the transferring and receiving waters occurred below; none was considered legally relevant.

The government's attempt to reconcile the case law by reference to how each court resolved this factual question is far off the mark. Far from neatly "distinguishing between [unitary and separate water bodies] for purposes of imposing NPDES permitting requirements" (US Br. 10), the courts of appeals differ fundamentally as to whether that distinction is of legal significance. Thus, in *Dubois*, the First Circuit rejected precisely the argument made by the government here, holding categorically that

> there is nothing in the [CWA] evincing a Congressional intent to distinguish between "unrelated" water bodies and related or hydrologically connected water bodies. The CWA simply addresses "any addition of any pollutant to navigable waters from any point source."

102 F.3d at 1298. And in *Gorsuch* and *Consumers Power*, which both held an NPDES permit *not* to be required, the D.C. and Sixth Circuits described the facts as involving moving water from one distinct water body (a reservoir and impoundment, respectively) to another (a river or lake). See 693 F.2d at 175; 862 F.2d at 589. The Second Circuit in *Catskill* did indeed rest its holding that a permit was required on the finding that water was moved between separate water bodies (mischaracterizing *Gorsuch* and *Consumers Power* as involving unitary waters). 273 F.3d at 492. But that ruling merely underlines the deep conflict and confusion among the courts of appeals.

As to a critical issue arising under a major federal statute and affecting public and private water managers and users throughout the Nation, the courts of appeals are in disarray. No factual question whether particular water bodies are unitary or separate underlies or resolves that deep conflict. Rather, the courts disagree on the meaning and application of core jurisdictional terms of the statute,

such as "discharge," "addition," and "from" a point source. This Court has recently considered the meaning of key CWA terms in *SWANCC* ("navigable waters") and *Borden Ranch* ("addition"), despite the factual component always involved in deciding how such terms apply in particular circumstances. It should do so again here to resolve a deep and important conflict among the circuits.

2. The Solicitor General pretends this case has "limited" importance beyond the operation of Everglades facilities. US Br. 14. But the government does not and cannot explain why the S-9 pumps and other Everglades facilities are any different for purposes of the CWA than millions of other water control devices around the country. Nothing about the Eleventh Circuit's sweeping "but for" test is unique to Everglades facilities or their regulatory framework. Accordingly, the court of appeals relied upon *none* of the Everglades-specific legislation discussed in the government's brief. US Br. 2-6. The government fails to explain how that legislation changes the CWA analysis in any way. The opinion below plainly implicates all water control structures that divert pollutants into waters which they otherwise would not go. Already, the Ninth Circuit has adopted the Eleventh Circuit's "but for" test to hold – in the context of an energy extraction operation that diverts groundwater into surface waterways – that "transporting water" "from one water body to another" without an NPDES permit can violate the CWA. *Northern Plains Res. Council* v. *Fidelity Expl. & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003).

In asserting that this case is of limited import the Solicitor General ignores the contrary conclusions of many public and private amici, including the National League of Cities, Association of Metropolitan Sewerage Agencies, National Association of Flood and Storm Water Management Agencies, Association of Metropolitan Water Agencies, Western Coalition of Arid States, National Water Resource Association, Western Urban Water Coalition, American Farm Bureau Federation, and Pacific Legal Foundation. He also fails to mention letters from numerous state and federal officials (including seven state attorneys general and a

bipartisan group of western Senators) gravely concerned about the far reaching consequences of the ruling below and explaining the need for this Court's urgent review. App., *infra.* 1a-17a.

Nationwide, these amici and elected officials explain, water transfers that are "essential steps" in providing water for irrigation, drinking water, flood control, ecosystem and species preservation, and other uses – transfers which have heretofore been uniformly regarded as outside the scope of the NPDES scheme – will now be dependent upon the vagaries of the costly, time-consuming, and uncertain NPDES permit process and its attendant litigation, because "[t]he biochemical constituents" of different waters "are inevitably different from one another." Br. Am. Cur. of NWRA, *et al.*, 4; Br. Am. Cur. of City of N.Y., *et al.*, 8. In consequence, water managers, though they add nothing to the water they transfer, will have to "significantly modify their operations," spend huge sums on "water treatment systems," "curtail their operations," or abandon innovative programs based on water banking and transfer that are designed to optimize water utilization. NWRA Br. at 5, 13. Downstream users and groups dissatisfied with water allocations to sport fishing, endangered species, agriculture, or myriad other interests will predictably use the NPDES permitting system to reopen and try to enhance those allocations. *Id.* at 6. See also, *e.g.*, N.Y. Br. at 2 (court of appeals' decision threatens "local governments' ability to move water from one source to another to meet local water supply needs" through "millions" of structures, none of which now operate with a federal permit). Nowhere does the Solicitor General respond to these serious concerns, expressed by public water management bodies that are far better placed to discern the havoc the Eleventh Circuit's faulty interpretation of the CWA will wreak.

Even accepting the government's mistaken view that this case is somehow limited to Everglades facilities, the critical importance of the questions presented to the Everglades cannot be doubted. The government concedes that petitioner and respondent Tribe are part of the Task Force charged with coordinating Everglades restoration policies.

US Br. 5. This and other suits anticipated against Petitioner's facilities takes restoration out of the cooperative, multiparty process that Congress established under the Water Resources Development Act and puts it instead in the hands of the federal courts and the burdensome, unpredictable NPDES process, in which every NPDES application and permit can result in further litigation over the propriety of permit issuance or conditions at the behest of any party that did not get what it wanted in the political process. "Congress has authorized more than one billion dollars in initial projects under CERP" (US Br. 5) – including hundreds of millions of dollars devoted to projects specifically involving the levees, canal, and basin served by the S-9 pump (US Br. 7) – as part of a restoration plan expected to cost in excess of $8 billion over the next several decades. Absent this Court's intervention, that project, on which hinges Congress' goal of "restoring, preserving, and protecting" the Everglades for future generations (US Br. 4), will be mired in costly and time-consuming NPDES permit proceedings and ensuing litigation and appeals, without any plausible basis in the CWA or its implementing regulations and contrary to the agencies' longstanding recognition that NPDES is not an appropriate feature of the regulatory environment for Everglades restoration.

The Solicitor General asserts that the decision below "may have circumscribed consequences even with respect to the Everglades" as a result of the Eleventh Circuit's subsequent decision in *Fishermen* v. *Closter Farms*, 300 F.3d 1294 (11th Cir. 2002). US Br. 15-16. *Closter Farms* in fact underlines the pressing importance of the questions presented. Under *Closter Farms* and the instant decision, an NPDES permit is required to transfer water containing any pollutants that are non-exempt or not already permitted under NPDES at their source. On that analysis, the need for an NPDES permit depends on an intense factual and legal inquiry into the source of *all* pollutants in the transferred water and whether *each* source either qualifies under the CWA as *exempt* or is *properly permitted* under NPDES. That is precisely the inquiry being undertaken in two additional suits filed against petitioner's facilities and that will have to

be undertaken in dozens more suits as to which notices of intent to sue have been given or that otherwise are expected to follow. Pollutants make their way to the C-11 canal and other water-collection features managed by the District from an enormous variety of sources, including runoff from many agricultural sources (not just exempt irrigation returns and stormwater runoff), municipal runoff, water released from devices protecting dozens of residential and commercial developments, naturally occurring pollutants, and water arriving in countless other ways. In consequence, the approach in *Closter Farms* will result in endless, complex, and uncertain litigation that is only necessitated by the concededly "incorrect" ruling below that an NPDES permit is required in the first place. Contrary to the government's belief that *Closter Farms* will circumscribe this problem, it is the substitution of endless bickering about "the facts in each case" for the "blanket rule" mandated by the CWA that is legally erroneous and practically destructive and that warrants immediate correction by this Court. US Br. 16.

3. The government wrongly speculates the burdens imposed by the ruling below "may be relatively modest." US Br. 17. The *erroneous* imposition of *any* federal regulatory scheme upon traditionally state and local activities, especially one like the CWA that provides for severe criminal and civil penalties, should alone be enough to warrant review. And there is nothing "modest" about NPDES permitting, which involves a labyrinthine application process that includes public hearings and comments, extensive water sampling and testing, effluent limitations, strict technological standards, and the treatment of pollutants. See US EPA's NPES Permit Writers Manual <http://www.epa.gov/npdes/pubs/owm0243.pdf>; Ch. 62-620, Fla. Admin. Code. This burden is compounded by the opportunities for litigation about the propriety of a permit and compliance with its terms once it is issued. Obtaining and defending permits nowhere required by the CWA will divert resources from the Comprehensive Everglades Restoration Plan that the federal and state participants deem the preferred route for environmental restoration, and interfere with countless other water management programs across the country. That

the injunction against the operation of S-9 issued by the district court was lifted ameliorates none of the burdens of NPDES compliance, which are all the more severe because petitioner (like most public water managers) now faces the threat of criminal and civil penalties for its handling of pollutants introduced by others it does not control. See, *e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003) (imposing $5.75 million civil fine on New York, out of a maximum possible fine exceeding $63 million, for having moved water without an NPDES permit).

Petitioner also takes no solace in the government's suggestion that general permits and compliance schedules may diminish these burdens: they do not. US Br. 17. General permits were developed to streamline the process of permitting *large numbers* of similar point sources, something the government claims will not result from this case (despite the slew of suits and notices to sue involving district facilities that followed the ruling here). See *General Permit Program Guidance, EPA Office of Water* 4 (1988). General permits still impose effluent limitations, technological standards, costly treatment, monitoring, and sampling. *Ibid.*; Sec. 62-621.100, Fla. Admin. Code. Establishing a general permit through rulemaking often takes years, to determine that the point sources are substantially similar in operation, discharge the same types of pollutants and require similar effluent limitations and monitoring. Sec. 62-620.705, Fla. Admin. Code. And general permits have become particular targets recently of administrative and judicial challenge. See, *e.g.*, *Minnesota Ctr. for Envir. Adv.* v. *Minn. Pollution Ctl. Ag.*, 660 N.W.2d 427 (Minn. App. Ct. 2003). Compliance schedules merely defer onerous obligations upon a showing that time is necessary to comply, while imposing additional annual reporting requirements. 40 C.F.R. §122.47.

The burden of NPDES permitting cannot be mollified by "replicating the standards, schedules and strategies of the existing state permit." US Br. 17. State permitting, adopted under a different regulatory scheme, provides local water managers necessary flexibility to balance competing interests. NPDES imposes a more stringent duty to meet effluent

limitations tailored to individual point sources through best available technological controls, leaving water managers unable to consider other critical environmental factors. As the Petition explains, NPDES is a poor substitute for the comprehensive watershed planning by agencies with specialized expertise the existing state permitting scheme provides. Pet. 21.

The government's myopic view that this case is somehow limited to Everglades facilities leads it to ignore the broader impact of expanding NPDES. That includes tremendous burdens on already resource-strapped regulatory agencies that will have to permit hundreds of thousands of newly regulated point sources, and on state and local water management agencies that must divert scarce resources to a permitting process that Congress never intended to apply to mere movement of water.

4. Inexplicably, the government ignores the second question presented, whether deference should have been given the federal and state implementing agencies. The government concedes the agencies' knowing acquiescence in the operation of S-9 without an NPDES permit and participation in developing the Comprehensive Everglades Restoration Plan as the preferred method of addressing water quality problems for the Everglades. US Br. i, 5-6. The government fails to acknowledge Florida DEP's express concurrence that NPDES is not required. Pet. App. 43a-48a. These longstanding agency positions are confirmed by the government's view that the decision here was incorrect. In these circumstances, deference is required to the implementing agencies' consistent interpretation of the CWA that an NPDES is not necessary. The extent to which deference is required in these circumstances warrants this Court's review. See Pet. 27-29; *AT&T Corp.* v. *Iowa Util. Bd.*, 525 U.S. at 385 n.10.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, this Court should grant certiorari, not leave the questions presented to a stream of wasteful litigation and administrative challenges.

Respectfully submitted,

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APPENDIX

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May 14, 2003

By Fax and Regular Mail

The Honorable Theodore Olson
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Re: Petition for Writ of Certiorari in Miccosukee Tribe of Indians v. South Florida Water Management District, 280 F.3d 1364 (11th Cir. 2002)

Dear Solicitor General Olson:

I write to follow up our telephone conversation of yesterday concerning the petition for a writ of certiorari in *Miccosukee Tribe of Indians v. South Florida Water Management District*. On behalf of the City of New York, I urge you to support the petition and to encourage the Supreme Court to reverse the decision of the Eleventh Circuit, which poses a serious threat to local governments and water management agencies throughout the nation.

As we discussed, the Eleventh Circuit in the Florida case followed the Second Circuit's decision in *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001). In *Catskill Mountains*, several sporting groups initiated a Clean Water Act citizen suit against New York City, claiming that the City's transfer of water from one of its drinking water reservoirs,

which naturally contains suspended solids because of the geology of its watershed, to the main tributary of another City reservoir, constituted the discharge of pollutants requiring a permit under the Clean Water Act. Although the District Court granted the City's motion to dismiss, the Second Circuit reversed, holding that the transfer is subject to the Clean Water Act. We believe the decisions of the Second and Eleventh Circuits are inconsistent with decisions of the decisions [sic] of the two other federal appellate courts: *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988).

Because of the City's and other local governments' general concerns as water managers, and the City's specific concerns in light of the *Catskill Mountains* case, my office submitted an amicus brief in support of the South Florida Water Management District's petition for certiorari on behalf of New York City, several national organizations representing municipal and regional water management agencies, and the National League of Cities. (A copy of that amicus brief is enclosed with the mailed copy of this letter.)

Both *Catskill Mountains* and *Miccosukee* involve the question of what constitutes an "addition" of pollutants under the Clean Water Act for purposes of determining whether a discharge requires a Clean Water Act permit. In both cases, appellate courts essentially held that the mere diversion of untreated water that, *for reasons not caused by the municipality undertaking the diversion*, constitutes an "addition" of pollutants. This interpretation of the Clean Water Act has very significant potential impacts on any number of activities that have not previously been subject to Clean Water Act permits, such as transfers of

water from one reservoir to another (New York City's immediate concern), water management for flood control (the issue in the Florida case), releases from dams, and operation of canals.

While certain transfers of natural waters can and should be regulated pursuant to other federal and state laws, the permitting scheme under the Clean Water Act (known as the National Pollutant Discharge Elimination System, or "NPDES" program) is not an appropriate means for addressing such transfers. First, the NPDES program was designed to address discharges from wastewater treatment plants and industrial facilities and cannot effectively handle several million additional dams, canals, and other existing water transfer structures. The current volume of some 116,000 NPDES permits issued nationwide already strains the administrative and technical capacities of EPA and the delegated states. For instance, according to EPA's website, 18% of outstanding NPDES permits have expired, which indicates that the administrative agencies have not been able to meet the statutory requirement that NPDES permits be issued for no more than five years. *See* 33 U.S.C. § 1342(b)(1)(B).

Second, the NPDES program does not have the flexibility to ensure that facilities necessary for public health and safety can remain in operation. NPDES permits must include requirements to "achieve water quality standards." 40 CFR § 122.44(d)(1). To take New York City as an example, this requirement poses a significant challenge, since there may be no practicable way to ensure that the discharge at issue in *Catskill Mountains* can meet the New York State water quality standard for turbidity: no increase that will cause a substantial visible contrast to natural conditions. Conceivably, this could lead to a

prohibition against New York City's continued use of the approximately 16% of its water supply provided by the facility at issue in *Catskill Mountains*. Loss of this water source would jeopardize the City's ability to ensure an adequate supply of water to meet its daily demand.

For these reasons, the decisions of the Second and Eleventh Circuits are of great concern to a variety of private and governmental parties and therefore should be reviewed by the Supreme Court. We very much appreciate your attention to this matter. I hope you or your staff will feel free to call me if I can be of any assistance to you.

Sincerely,

/s/ Michael A. Cardozo
Michael A. Cardozo

MAC/ay

cc: Edwin Kneedler, Deputy Assistant Solicitor General
Mark Hoffer, General Counsel, NYC Department of Environmental Protection

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[LOGO]

[State of Idaho]

DIRK KEMPTHORNE
GOVERNOR

May 5, 2003

VIA FACSIMILE AND U.S. MAIL

The Honorable Theodore B. Olson
Solicitor General
Department of Justice
Washington, DC 20530-0001

Re: *South Florida Water Management District v. Miccosukee Tribe of Indians*, United States Supreme Court No. 02-626 Petition for Writ of Certiorari

Dear General Olson:

I. INTRODUCTION

By order dated January 12, 2003, the United States Supreme Court asked for your views on a petition for certiorari pending in the above-entitled case, *South Florida Water Management District v. Miccosukee Tribe*, 280 F.3d 1364 (11th Cir. 2002), (*petition for cert. filed* Oct. 21, 2002) (U.S. No. 02-626) (*Miccosukee Tribe*). I am writing to strongly urge the Justice Department to request that the United States Supreme Court grant certiorari in this important case.

I am mindful of the sensitive setting of this particular application of the Clean Water Act. The Florida Everglades is a natural resource treasure to the State of Florida and our Country. Of course, the unwavering

efforts by the Bush Administration to protect the Everglades should continue with all due speed.

However, the holding of the Eleventh Circuit in *Miccosukee Tribe*, specifically, that the federal Clean Water Act (CWA) is expansive enough to require a National Pollutant Discharge Elimination System (NPDES) permit upon the mere movement of water between state transport systems, is an important issue of federal law which should be decided by the Supreme Court. The impact of this decision is already being felt in Idaho and the West.

Additionally, *Miccosukee Tribe* raises important federalism issues implicating the ability of states to maintain sovereignty over its water and warrants attention and clarification by the Court.

II. DISCUSSION

A. The Importance of the Holding in *Miccosukee Tribe* and Its Broader Impact in the Ninth Circuit and the West: *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*

The principles of law at stake in *Miccosukee Tribe* will potentially have far reaching impacts for water management throughout the country, particularly in the West. Indeed, the decision by the Eleventh Circuit has already had an expansive interpretation in the Ninth Circuit and, unless reviewed, is binding on the Western states.

On April, 10, 2003, a three-judge panel of the United States Court of Appeals for the Ninth Circuit decided *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, ___ F.3d ___, 2003 WL 1847401 (9th

Cir. 2003) (slip opinion attached), a case described by the court as analogous to *Miccosukee Tribe*.

In *Northern Plains*, an energy exploration company developing natural gas was accused of violating the Clean Water Act when it brought untreated coal bed methane ("CBM") produced water to the surface and into the Tongue River. The plaintiffs charged that an NPDES permit was needed even though the company did not add any chemicals to the water before discharge and the State of Montana exempted such discharge from the permitting requirements.

The critical issue in *Northern Plains* was whether the discharge of CBM water constituted a "pollutant" within the meaning of the Clean Water Act. The Ninth Circuit held that "the unaltered groundwater produced in association with methane gas extraction, and discharged into a river, is a pollutant within the meaning of the CWA." *Northern Plains*, slip op. at 4814. In reasoning that parallels *Miccosukee Tribe*, the Ninth Circuit noted that "but for" the action of the discharger, water would not reach waters of the United States.

The Ninth Circuit in *Northern Plains* cited *Miccosukee Tribe* as support for three key findings under the Clean Water Act.

First, the court held that the requirement in the CWA for pollution be "man-induced" refers to the effect of the discharge *on the receiving water*, but does not require that the discharged water be altered by man. *Id.* at 4822. Second, the court stated that merely "transporting water from one water body to another can violate the CWA." *Id.* at 4824. Finally, the Ninth Circuit held that the transport

of water can degrade the water quality of receiving waters. *Id.* at 4285.

Citing both the language of the CWA and the conclusions of other circuits in analogous cases (*Miccosukee Tribe, Catskill Mountain Chapter of Trout Unlimited, Inc. v City of New York*, 273 F. 3d. 481 (2nd Cir. 2001), *DuBois v. U.S. Dept. of Agric.*, 102 F 3d. 1273 (1st Cir. 1996), the Ninth Circuit held that CBM water discharged into the Tongue River is a "pollutant" under the CWA, *id.* at 4824, and that the discharger is subject to the NPDES permitting requirements of the CWA.

Northern Plains does not address a transbasin water transfer *per se*, but its essential holding – the transfer of unaltered water from one water body to another is subject to NPDES permitting where it alters the water quality of the receiving body – is analogous to *Miccosukee Tribe*. This sets a potentially dangerous precedent in the Ninth Circuit and the West. One of the legal cornerstones of the dubious decision in *Northern Plains* is the instant case the Supreme Court has asked for the views of the United States.

B. The Holding of *Miccosukee Tribe* Raises Important Federalism Concerns

As noted in the *amicus curiae* brief filed in the Supreme Court by the National Water Resources Association, the decision in *Miccosukee Tribe* degrades the right of states to control their water and delegated Clean Water Act programs. I strongly agree that "[t]he management of land and water is predominantly a state prerogative." Brief Amicus Curiae of the National Water Resources Coalition, *et al.*, at 12.

The *Northern Plains* decision, which, as noted above, relied heavily on *Miccosukee Tribe*, is a case study of how the balance of water management in favor of the states may be set askew. There, the State of Montana Department of Environmental (MDEQ) quality had determined that an NPDES permit was *not* necessary for the CBM exploration engaged in by the defendants, and that view was upheld by the District Court. As noted, the Ninth Circuit disagreed and reversed.

The most troubling passage of *Northern Plains* is the Ninth Circuit's observation that "it cannot possibly be urged that . . . state law in itself can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution's Supremacy Clause." *Northern Plains*, slip op. at 4827. The Ninth Circuit reached this conclusion after the lower court held that the MDEQ-administered Clean Water Act program had been appropriately approved by the United States Environmental Protection Agency and not revoked.

Accordingly, under *Miccosukee Tribe*, the states and the water user community could still be exposed under the Clean Water Act even though they might have received assurances that an NPDES permit is not necessary for the type of water transactions they have safely practiced in the past. *Northern Plains*, strongly supported by *Miccosukee Tribe*, clearly places state-delegated CWA programs on a slippery slope favoring the top-down regulatory decision making that "cooperative federalism" models were designed to avoid.

III. CONCLUSION

The pending petition for writ of certiorari in *South Florida Water Management District v. Miccosukee Tribe* raises important issues of federal law which should be decided by the United States Supreme Court. Additionally, the ability of states to administer water management programs with integrity and under cooperative federalism paradigms is at stake if the decision is allowed to stand.

For these reasons, the United States should request to the Supreme Court to grant certiorari in *Miccosukee Tribe*.

Your personal attention to this matter is greatly appreciated.

Sincerely,

/s/ Dirk Kempthorne
DIRK KEMPTHORNE
Governor

DK: lmb

cc: Ms. Ann Klee
Counselor to the Secretary
Department of Interior

Mr. Norman Semanko
Executive Director
Idaho Water Users Association

United States Senate
WASHINGTON, DC 20510

February 21, 2003

Hon. Theodore B. Olson, Solicitor General
Office of the Solicitor General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

RE: *Miccosukee Tribe of Indians v. So. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002)

Dear Solicitor General Olson:

We urge you to support the petition for certiorari in Miccosukee Tribe of Indians v. So. Florida Water Mgmt. Dist. 280 F.3d 1364 (11th Cir. 2002). This Eleventh Circuit decision results in a significant split in the federal circuits. States require clear and settled legal parameters in managing their land and water resources.

In the West, the transference of water between basins for municipal, industrial and agricultural use is a routine practice managed by the states. Under the Miccosukee opinion, any transfer of water containing a measurable quantity of constituents from one basin or sub-basin to another through a ditch, tunnel, canal, pipeline or other conveyance structure in the legitimate exercise of water rights and in order to fulfill municipal, agricultural and industrial water supply demands would require an NPDES point source discharge permit. This permit requirement would apply even though the transfer of water is in its natural condition, and the entity moving the water adds no pollutants. Such a constraint upon the ability to move water to the place of need, for example from high mountain run-off areas to dry low-lying urban corridors,

could significantly impair Western economies and exacerbate our drought situation, while interfering with land use planning decisions.

As you are aware, the Supreme Court has invited you to file a brief expressing the views of the United States in this case. The Circuits are now equally divided. While the First, Second and now Eleventh Circuits have held that such basin transfers are point sources that require permits, the Fourth, Sixth and D.C. Circuits have interpreted the Act as requiring the introduction of a pollutant from a point source before such a permit is mandated.

In finding that such water conveyance activities trigger a need for a permit, Miccosukee implicates every trans-basin and intra-basin diversion, thereby threatening our ability to use our limited water resources to meet both traditional consumptive uses, as well as environmental demands. For example, much of the water upon which certain threatened or endangered species now depend is trans-basin return flows, while what were historically dry arroyos or ephemeral stream systems are now perennial in nature due to the use of imported waters.

The federal government has long recognized the right to use water is to be determined under the laws of the states. Federal regulation of the simple movement of water, as would be the case under Miccosukee, is in direct convention of this well-established balance between state and federal interests, as reflected in Section 101(g) of the Clean Water Act.

The Supreme Court is clearly interested in this case, not only for its CWA post-SWANNC issues, but also its federalism implications. We believe the United States has an obligation to protect the interests of all its citizens from

the impacts of an overly broad court holding, the practical implications of which may not have been fully considered. We therefore urge you to support the petition for certiorari.

Sincerely,

/s/ Jon Kyl
Jon Kyl
United States Senator

/s/ Dianne Feinstein
Dianne Feinstein
United States Senator

/s/ Gordon Smith
Gordon Smith
United States Senator

/s/ Ron Wyden
Ron Wyden
United States Senator

/s/ Pete Domenici
Pete Domenici
United States Senator

/s/ Ben Nelson
Ben Nelson
United States Senator

/s/ Wayne Allard
Wayne Allard
United States Senator

/s/ Max Baucus
Max Baucus
United States Senator

/s/ Larry Craig
Larry Craig
United States Senator

/s/ Orrin Hatch
Orrin Hatch
United States Senator

/s/ Mike Crapo
Mike Crapo
United States Senator

/s/ Craig Thomas
Craig Thomas
United States Senator

/s/ Ben Nighthorse Campbell
Ben Nighthorse Campbell
United States Senator

/s/ Conrad Burns
Conrad Burns
United States Senator

/s/ Kay Bailey Hutchison
Kay Bailey Hutchison
United States Senator

cc:

The Honorable Gale Norton
Secretary of the Interior

The Hon. LTG Robert B. Flowers
Commander
HQ US Army Corps of Engineers

The Honorable
Christie Todd Whitman
Administrator, Environmental
Protection Agency

The Honorable
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Environment and Natural
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Mr. Paul Clement
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January 24, 2003

The Honorable Gale A. Norton
Secretary of the Interior
U.S. Department of the Interior
1849 C. Street N.W.
Washington, D.C. 20240

CORRECTED COPY – W/SIGNATURES

Dear Secretary Norton:

The undersigned Attorneys General urge your consideration of this matter. As you know, the United States Supreme Court is considering a Petition for Writ of Certiorari in the case of *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.* No. 02-626. We understand that the Supreme Court has requested that the United States Solicitor General provide the Court with the views of the United States government on the issues raised in the case. We are writing to you now to urge that your department support granting the Petition for Writ of Certiorari and reversing the decision of the United States Court of Appeals for the Eleventh Circuit.

The *Miccosukee* case raises an issue of vital importance to the economic and social well being of the West. The issue presented in the case is whether the mere collection of water in one river basin and delivering that

water to another river basin for use, without the addition of any pollutants by the water purveyor, requires a National Pollutant Discharge Elimination Permit under the federal Clean Water Act.

Water in the arid west is all to often located far from the areas where it is most needed. Accordingly, the United States Bureau of Reclamation, and numerous western cities, irrigation districts, water conservancy districts and other water providers operate extensive systems of tunnels, canals, pipelines and reservoirs that move water from one river basin to another, so that the water can be used for irrigation, municipal and other purposes. For example, in New Mexico the Cities of Santa Fe and Albuquerque, and numerous farmers, depend upon transbasin water deliveries to meet municipal water supply needs and to irrigate vital crops. Similar transbasin projects exist throughout the West.

The imposition of a new federal permitting requirement on these long standing water transportation practices could require the owners/operators of the affected facilities to either significantly modify their operations, build and operate expensive water treatment systems, or curtail their operations altogether. Thus, this new permitting requirement could severely impact the continued economic vitality of the west, and could even reduce or eliminate water supplies in some cases.

Both the Congress and the United States Supreme Court have historically deferred to the states in matters of water use, and have avoided impinging on state and local authority in this area. The federal Clean Water Act does not contain any plain statement indicating a contrary intent of Congress, and, in fact, expresses Congress' continued desire

to honor state and local decision-making in the management of water resources. 33 U.S.C. § 1251(g). In light of the great importance of this issue to the arid west, we urge that your department continue to honor this historic deference to state law in matters of water use and support granting the Petition for Writ of Certiorari and reversing the court of appeals decision.

If you have any questions or concerns about our position or the issues, please do not hesitate to contact CWAG Executive Director Tom Gede at 916-323-1939, e-mail at tom.gede@doj.ca.gov. or New Mexico Attorney General Patricia or her Assistant Attorney General Steve Farris at (cell) 505-239-4672, (office) 505-827-6938.

/s/ Patricia Madrid
Patricia Madrid
New Mexico Attorney General

/s/ Terry Goddard
Terry Goddard
Arizona Attorney General

/s/ Mike McGrath
Mike McGrath
Montana Attorney General

/s/ Wayne Stenehjem
Wayne Stenehjem
North Dakota Attorney General

/s/ Larry Long
Larry Long
South Dakota Attorney General

/s/ Mark Shurtleff
Mark Shurtleff
Utah Attorney General

/s/ Ken Salazar
Ken Salazar
Colorado Attorney General